Massachusetts Supreme Court affirms that one expert can testify on the work of another in 3 separate cases.

From: Massing, Greg (EPS)
Sent: Tuesday, September 15, 2009 11:38 AM
To: Massing, Greg (EPS); Aliprantis, Kim (DAA); Arguin, James (AGO); Franco, Jennifer (DAA); Graydon, Elin (EAS); Holler, Julia (CPI); Hunt, Pamela (AG0); Kukafka, Varsha (NFK); Linn, Paul (SUF); Maguire, Tara (DAA); Mark, David (BRI); Middleton, Bridget (PLY); Montori, Jane (WES); Nardone, Andrea (DAA); Pieropan, Joseph (BER); Pietras, Judith Ellen (NWD); Sahakian, James (NOR); Sullivan, Jane (MID); Thompson, Robert (PLY); Wall, Josh (SUF); Williams, Geline (DAA); Zanini, Jack (SUF)
Cc: Burke, Kevin (EPS); Grossman, John (EPS); Connolly, James (POL); Nassif, Julianne (DPH); 'ellen.selin@umassmed.edu'; Matthews, Steve (POL); 'Bedrosian, Ed (AGO)'; 'chieftmc@wellesleyma.gov'; 'Wayne Sampson'; 'jackmcopa@aol.com'; 'daniel_o'leary@town.brookline.ma.us'
Subject: RE: More on Melendez-Diaz - procedures for narcotics testing (and why an expert can offer an opinion based on tests she did not personally conduct)

The SJC issued three opinions today (Hensley, Avila, and Santos) reaffirming Nardi for the proposition that an expert can render an opinion based on tests conducted by another expert. Henlsey and Avila expressly reject Confrontation Clause challenges. In note 7 of Hensley, the Court specifically rejects the contention "that facts or data that are 'independently admissible' actually must be admitted at trial through percipient witnesses in order to satisfy the defendant's right of confrontation," reaffirming note 1 of Melendez-Diaz for the proposition that not every analyst who touches the evidence needs to appear at trial. Avila specifically says this procedure is not contrary to Melendez-Diaz.

Thank you, ADAs Cathy Semel and Kathleen Celio!

Relevant excerpts are reproduced below:

Hensley

First, there was no error in admitting the testimony of Dr. Flomenbaum regarding his opinion as to the cause of death. Dr. Flomenbaum appeared as a witness at the trial, opined as an expert on the basis of information on which experts ordinarily and may properly rely, and was subject to cross-examination. In this respect, the case is governed by *Commonwealth v. Nardi,* 452 Mass. 379, 387-391 (2008) (right of confrontation not violated where medical examiner who did not perform autopsy permitted to testify to his own opinion as to cause of death). [FN7] To the extent that Dr. Flomenbaum testified on direct examination to some of the specific findings in the autopsy report (made by Dr. Zane) on which he based his opinion as to the cause of the victim's death, and such testimony may not have been admissible at that point in the trial, see *id.* at 391-394 (testifying medical examiner should not have been permitted to testify on direct examination to underlying findings in autopsy report prepared by another medical examiner), any such error was harmless where the cause of death was not a contested issue at trial.

FN7. Hensley further claims that in light of *Crawford v. Washington,* 541 U.S. 36 (2004), in a criminal trial, an expert cannot base his or her opinion on the work of other experts who will not be called as witnesses. More specifically, Hensley contends that our ordinary rule regarding the proper basis for expert testimony, as set out in

Commonwealth v. Markvart, 437 Mass. 331, 337 (2002), which includes "facts or data not in evidence if the facts or data are *independently admissible* and are a permissible basis for an expert to consider in formulating an opinion" (emphasis added) should now be interpreted to require that facts or data that are "independently admissible" actually must be admitted at trial through percipient witnesses in order to satisfy the defendant's right of confrontation. This view has been rejected by other courts, see *United States v. De La Cruz,* 514 F.3d 121, 134 & n. 5 (1st Cir.2008), cert. denied, 129 S.Ct. 2858 (2009), quoting *Crowe v. Marchand,* 506 F.3d 13, 17-18 (1st Cir.2007) (medical examiner not precluded under *Crawford* from expressing opinion about cause of death based on factual reports prepared by another medical examiner who was unavailable to testify; expert reliance on reports prepared by other medical professionals "plainly justified in light of the custom and practice of the medical profession"). We reject Hensley's argument as well.

Avila

Expert opinion testimony of this nature is permissible as an evidentiary matter. "[Medical] examiners, as expert witnesses, may base their opinions on (1) facts personally observed; (2) evidence already in the record or which the parties represent will be admitted during the course of the proceedings, assumed to be true in questions put to the expert witnesses; and (3) 'facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.'" *Nardi, supra* at 388, quoting *Commonwealth v. Markvart,* 437 Mass. 331, 337 (2002). An expert with no firsthand knowledge of the facts at issue, such as a substitute medical examiner, "will not be able to testify factually, but will be asked to state an expert opinion based upon facts assumed in the questions put to [the expert] hypothetically, by sitting through the trial, or on the basis [of] certain qualifying data made available to the expert prior to the trial or hearing." W.G. Young, J.R. Pollets & C. Poreda, Evidence § 703.1, at 503 (2d ed.1998). An autopsy report is a " 'permissible basis for an expert to consider in formulating an opinion' ... because 'the underlying "facts or data" contained [therein] would potentially [be] admissible through appropriate witnesses.'" *Nardi, supra* at 389, quoting *Commonwealth v. Markvart, supra.* See *United States v. De La Cruz,* 514 F.3d 121, 134 n. 5 (1st Cir.2008), cert. denied, 129 S.Ct. 2858 (2009), quoting *Crowe v. Marchand,* 506 F.3d 13, 17-18 (1st Cir.2007) ("[A]s a matter of expert opinion testimony, a physician's reliance on reports prepared by other medical professionals is 'plainly justified in light of the custom and practice of the medical profession. Doctors routinely rely on observations reported by other doctors ... and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony ... to have performed every test, procedure, and examination himself' "). "The expert may, however, 'be required to disclose the underlying facts or data on cross-examination,' including that he did not personally conduct the relevant tests and examinations." *Nardi, supra* at 390, quoting *Commonwealth v. Daye,* 411 Mass. 719, 743 (1992).

Expert opinion testimony of this nature does not offend the confrontation clause as interpreted by the Supreme Court of the United States in *Crawford v. Washington,* 541 U.S. 36 (2004) (*Crawford*) (confrontation clause prohibits admission of testimonial out-of-court statements unless declarant unavailable and defendant had prior opportunity to cross-examine declarant about statements), and most recently in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009) (deeming certificates of forensic laboratory analysis offered in evidence in lieu of testimony as testimonial,

and thus subject to *Crawford,* because certificates were affidavits prepared for sole purpose of serving as evidence at trial). To repeat, as we held in *Nardi,* the substitute medical examiner, as an expert witness, is not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report. [FN18] *Nardi, supra* at 394 (deeming statements in autopsy report testimonial hearsay barred by *Crawford*). The expert witness's testimony must be confined to his or her own opinions and, as to these, the expert is available for cross-examination.

From: Massing, Greg (EPS)
Sent: Wednesday, August 05, 2009 11:19 AM
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Cc: Burke, Kevin (EPS); Grossman, John (EPS); 'Connolly, James M.'; Nassif, Julianne (DPH); 'ellen.selin@umassmed.edu'; Matthews, Steve (POL); Bedrosian, Ed (AGO); chieftmc@wellesleyma.gov; Wayne Sampson; jackmcopa@aol.com; daniel_o'leary@town.brookline.ma.us
Subject: More on Melendez-Diaz - procedures for narcotics testing (and why an expert can offer an opinion based on tests she did not personally conduct)

Dear Appellate Chiefs:

In the wake of Melendez-Diaz, the State Police, DPH, and U Mass Crime Labs are making every effort to provide analysts to testify at trials and, at the same time, continue to provide forensic services. We are looking at new ways to increase efficiency and assign cases within and among the labs to meet the needs created by the decision.

As you know, many defendants are now making the argument, which many judges are (erroneously, in my view) accepting, that no piece of underlying scientific evidence can even be referred to unless the analyst who created it is present to testify. (I am aware the some ADAs are sympathetic to this argument.) This affects not only drug cases, but also DNA cases, cases in which medical examiners testify, OUI cases, and others cases involving the labs.

Any possibility of the labs being able to come anywhere close to meeting your investigative and prosecutorial needs greatly depends on the labs being able to send an analyst who did not necessarily perform the analysis in question to testify as an expert as to its results. This practice was approved by the SJC in numerous pre-Melendez-Diaz cases, and, in most cases, Melendez-Diaz should not preclude this practice.

As Justice Scalia stated in the majority opinion, Melendez-Diaz "do[es] not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Melendez-Diaz, slip op. at 5 n.1. Crawford holds that testimonial hearsay isn't admissible without an opportunity to cross-examine the declarant. Melendez-Diaz simply holds that a chemist's affidavit is testimonial hearsay, so it isn't admissible without an opportunity to cross-examine the declarant, in that case, the affiant. It doesn't hold that we have to introduce the certificate or the declarant to prove our cases, only that we can't have the first without the second.

Some have argued that having Expert B testify about Expert A's test results is no different from having Expert B testify, for example, "Expert A said that this substance is cocaine." I don't know if this is a violation of the Confrontation Clause, but it is certainly inadmissible hearsay. The argument proceeds that it shouldn't make any difference were the prosecutor to ask Expert B, "Have you reached an opinion as to the composition of the substance contained in the bag marked Exhibit 1?", and Expert B were to answer, "In my opinion the substance is cocaine," if, when asked for the basis of the opinion on cross-examination, Expert B would answer, "Expert A told me so."

Last week Undersecretary Grossman and I toured the State Police Crime Lab to observe the testing process and the documentation generated in the course of testing narcotics. Based on what actually happens at the lab, in most cases, I can confidently tell you that nature of Expert B's testimony would be far different from the hypothetical testimony described above. Expert B would not simply be repeating Expert A's conclusion, but would be giving an independent opinion.

The State Police Crime Lab's procedures for testing "powders" (i.e., heroin, cocaine, pills), and the documents they generate, demonstrate why an expert who did not perform the test can testify about its results without relying on testimonial hearsay. Cases are submitted by the investigating agency (a State Police unit, or a local police department) to the evidence intake room. The submitting agency provides identifying information about the underlying case, and it is assigned a State Police laboratory number. The evidence room bags, seals, weighs, and logs in the evidence. The case is then assigned to a chemist.

When the chemist is ready to test the submission, she first conducts an inventory, including re-weighing the sealed bags and making a visual inspection, to make sure there has been no tampering. She then unseals the bag(s) and carefully weighs the contents, taking notes of how the weighing was conducted (for example, in the original container/wrapper, out of the container, etc.). She then does a screening test, an intermediate test, and a confirming test. At least one test must be a "spectrum" test, which involves measuring light rays (e.g., infrared spectroscopy or ultraviolet spectroscopy), and at least one test must be a "molecular" test (e.g., mass spectrometry or gas chromatography). The tests involve dissolving a minute sample of the substance in a solvent, then have a machine measure various reactions or qualities. The crucial thing about all of these tests is that the output is a graph or chart, with waves or numerical ranges, which must be interpreted. The analyst who conducts the test does not need to interpret the test result; theoretically, the output could be placed in a file for another expert to read at a later date (the same way a radiologist who reads an x-ray or CAT scan can rely on technicians to perform the actual test).

At the State Police Crime Lab, however, after all the tests are concluded, the analyst who conducted the test(s) does in fact interpret the test results and reach a conclusion. The conclusion is included in a "report," which is then formally prepared in the form of a certificate of analysis. The report and the certificate contain basically the same content. At this point, the file is complete – it includes the inventory forms, the analyst's notes, all the underlying charts and graphs from the various tests, the report, and the certificate.

Thus, when Expert B testifies about the analysis of the bag marked Exhibit 1, which is marked with Lab ID # 12345, Expert B can testify about the testing process in general, then based on the documents in the file associated with Lab ID # 12345, but without relying on Expert A's report or certificate of analysis, reach a conclusion about the content of Exhibit 1. This is admissible under DYS v. A Juvenile, Nardi, Sparks, Jaime, and the other cases included in the draft motion in limine I circulated in early June, and it does not involve the admission of hearsay without an opportunity to confront the declarant.

It's also worth emphasizing that Melendez-Diaz is a 5-4 decision, and Justice Thomas's agreement with the majority is specifically limited to "formalized testimonial materials." The

underlying lab work, to the extent that such work comprises an out-of-court declaration (which I wouldn't concede), does not implicate the Sixth Amendment. See Melendez-Diaz, Thomas, J., concurring ("I write separately to note that I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'") (citation omitted).

A caveat to the above discussion. When touring the lab, we also were told about marijuana testing. Unlike the testing for powder described above, marijuana testing primarily involves an analyst looking at the sample under a microscope. In that case, the output of the test is the analyst's statement that she examined the substance and it looks like marijuana. Similarly, another test involves putting a sample in a solvent and observing whether it changes color, which the analyst notes. In this case, I'd agree that Expert B could not testify about the test conducted by Expert A – she would merely be repeating another analyst's conclusions.

To help us manage this crisis, we urge you to oppose and appeal any cases in which the non-testing expert is precluded from testifying about tests conducted by other analysts. We need definitive guidance from the SJC. I hope you find the above information helpful in framing these arguments. (As you know, the Suffolk DA's office recently prepared an excellent brief on this issue in a G.L. c. 211, § 3, matter in the context of DNA analysis, which may also be helpful.)

Thank you for your continued support and cooperation.

-Greg

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Subject: Melendez-Diaz v. Massachusetts

Dear Appellate Chiefs,

As you know, the Supreme Court of the United States has had Melendez-Diaz v. Massachusetts, No. 07-591 (Crawford/Confrontation Clause challenge to the admission of chemists' certificates of analysis as prima facie evidence under G.L. c. 22C, § 39, and G.L. c. 111, § 13), under advisement since November. The delay is interesting, and gives us reason to hope.

In the event that the Court finds a Crawford problem, and live testimony is going to be required to prove the weight, composition, and quality of controlled substances, given the staffing levels and financial resources of the three state laboratories that perform chemical analyses for criminal drug cases – the Department of Public Health State Laboratory in Jamaica Plain, the State Police Crime Laboratory in Sudbury, and the University of Massachusetts Medical School Laboratory in Worcester – it simply will not be possible in the short term (if ever) to have chemist available to testify in every drug trial. Accordingly, the three labs will have to coordinate with the District Attorneys' offices to identify those cases in which live testimony is most crucial. The DAs

and the labs may also work with the courts to schedule drug trials to provide the maximum availability of chemists. However, in many cases, especially in the first few months after a negative decision, a chemist may not be available to testify at all, and where a chemist is available, it may not be the same chemist who performed the original analysis.

Fortunately, the case law is clear that "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." Commonwealth v. Dawson, 399 Mass. 465, 467 (1987). Police officers with adequate training an experience in drug investigations, as well as drug users, are competent to testify about the weight and composition of drugs. The case law is also clear that qualified chemists can testify about the results of drug analyses that they did not personally perform, and they may rely on "facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986).

The Executive Office of Public Safety and Security has prepared some materials that may be helpful to your offices if your ADAs are called upon to introduce the testimony of police officers or "other chemists" to prove the weight, composition, and quality of drugs. The attached "sample testimony" document includes a menu of questions that prosecutors can use in the direct examination of police and chemist witnesses. Also attached are a couple of model motions in limine to admit such testimony. Obviously, you will want to adapt these materials for your various counties, and otherwise revise and edit, but these materials should at least give you a head start in identifying the relevant case law, etc.

I hope this all proves to be academic.

-Greg

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